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No. 83-558

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,

PETITIONER,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,

RESPONDENTS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Questions Presented

1. Whether clean intermittent catheterization (CIC) is considered a medical service for the purposes of the Education for All Handicapped Children Act (EAHCA).

2. Whether clean intermittent catheterization (CIC) is a related service necessary to enable the Respondent to benefit educationally from special instruction.

3. Whether this case should be remanded for reconsideration of the individualized education plan in light of the standards set by this Court in Board of Education of Hendrick Hudson Central School District v. Rowley, ___ U.S. ___, 102 S.Ct. 3034 (1982).

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Texas Association of School Boards' Legal Assistance Fund, by and through their attorney of record, Susan Feller Heiligenthal, and, pursuant to Rule 36 of the Supreme Court rules and procedures offers herewith its brief

of amicus curiae in support of Petitioners, the Irving Independent School District, its board of trustees and its superintendent.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards' Legal Assistance Fund is a non-profit organization whose membership is made up of more than 1,000 school districts throughout the State of Texas. The Association is active in its efforts to represent and assist local school districts throughout the state, expressing the concerns of member schools on issues of state or nationwide importance in public education. These member schools educate over 99% of the student population in elementary and secondary schools in the state.

All parties to the case have consented to the filing of this brief of amicus curiae.

ARGUMENT

I. Clean intermittent catheterization (CIC) should be considered a medical service for the purposes of the Education for All Handicapped Children Act (EAHCA) and, therefore, need not be provided by school districts to special education students such as Respondent.

To include, when appropriate, handicapped students in regular classroom experiences and to provide them with necessary, nonmedical related services necessary to benefit from that education, Congress passed the Education for All Handicapped Children Act of 1975. See 20 U.S.C. §1401 et seq.; H.R. Rep. No. 94-332, p. 2 (1975). The EAHCA requires state and local agencies receiving its funds to guarantee handicapped students the right to a "free appropriate education" consisting of special education and related services. 20 U.S.C. §§1401(18), 1412(1).

Special education may include classroom instruction, home instruction, or instruction in hospitals and institutions designed to meet the unique needs of each student. 20 U.S.C. §1401(16). But the EAHCA involves more than strictly education. Nonmedical services additionally may be required for a student to enable him to benefit from the educational opportunity. Those services, referred to in EAHCA as "related services" may involve transportation, developmental, corrective, and other supportive services. Examples in the EAHCA include

1) speech pathology and audiology,
2) psychological services,
3) physical and occupational therapy,
4) recreation, and
5) medical and counseling services "except that such medical services shall be for diagnostic and evaluation purposes only" 20 U.S.C. §1401(17) (emphasis added).

The federal statute makes no reference to other school health services. Yet, in the regulations implementing the EAHCA, "school health services" was added to the list of related services that must be available. 34 C.F.R. §300.13(a). This extension of related services to include "school health services" was purely a creation of the Department of Education. The Department's intent was admirable - - to insure the continued availability to special education students, as with all students, of the types of health services ordinarily provided by schools. However, the result has been to spawn attempts to expand school health offerings to include additional medical services.

Two problems exist. First, the requirement for "school health services" was created by regulation, which alone

is questionable. But, secondly, having created the term "school health services," the regulations offer no relevant guidance on the distinction between "school health services" and "medical" services. While the regulations do not generally define what constitues a medical service, they do limit required medical services to the diagnosis and evaluation of a medically-related handicap, which must be performed by a licensed physician. 30 C.R.F. §300.13(b)(14). The clear purpose is to require the necessary medical services to determine a child's medically related handicap, but not to require continuing medical services appropriate for a licensed health facility. The public schools are not hospitals. Similarly, the school health services created by regulation are not defined but only described by reference to who provides them, i.e., a "qualified

school nurse or other qualified person." 34 C.F.R. §300.13(b)(10). These inadequate descriptions of the distinctions between the regulatory creation of "school health services" and the statutorily required "medical services" has led to a wealth of litigation.

Legislative history does not reveal congressional intent in defining medical services. In lieu of such history, "medical services" should be given its commonly understood meaning. 82 C.J.S. Statutes §332 (1953). Unfortunately, the Fifth Circuit has misconstrued the statutory limitation that "medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. §1401(17); Tatro v. Texas, 625 F.2d 557, 562-564 (5th Cir. 1980)(hereinafter cited as Tatro I). That court erroneously assumed that the limitation on medical services did not apply to

other medical services provided by health professionals under a physician's direction.

It is doubtful that Congress intended to exclude other services not directly performed by but at the direction of a physician from the term "medical services." Obvious examples are such medical services as dialysis, intravenous feeding, nasalgastric feeding, respirator monitoring, catheterization, and radiation treatments.

In contrast, the commonly understood meaning of "school health services" are those services routinely provided by school nurses, such as dispensing medication prescribed by doctors, rendering first aid, and supervising health screening and immunization programs. The fact that these nurses may incidentally be qualified to perform all the duties of a hospital nurse

should not be used to expand the definition of "school health services" to include services such as catheterization, transfusions, and intravenous feedings, which are normally offered in a hospital's more sterile, environmentally-controlled facilities. It is far more reasonable to interpret "school health services" in the special education context to cover routine school functions such as administering prescribed medication or emergency assistance to students suffering from seizures.

This is particularly important to Texas school health employees in that Texas laws grant immunity to school nurses only for student injuries inadvertently arising from the administering of medication upon a parent's request. Tex.Educ.Code Ann. §21.914 (Vernon Supp. 1982-83). Expanding required services to include

administering catheterization to special education students creates a potential threat of personal liability to school health personnel not operating under the supervision of licensed physicians within the controlled structure of a hospital or other registered health facility.

The only other court to closely consider this definition was the Third Circuit. Tokarcik v. Forest Hills School District, 665 F.2d 443, (3rd Cir. 1981) cert. denied. sub nom. Scanlon v. Tokarcik, ___ U.S. ___, 102 S.Ct. 3508 (1982). That court largely based its conclusion on the precedent set by the Tatro I decision, which is the subject of this review.

The broad constructions of "school health services" by the Tokarcik and Tatro I courts lead to the unreasonable and surely unforeseen result of requiring that any medical impediments

to regular classroom attendance be removed. It stretches credulity to believe that such was the intent of Congress in its effort to extend basic education services to the handicapped.

When the terms "medical services" and "school health services" are considered in their proper context, it is clear that catheterization is indeed more a "medical service" for the purposes of the EAHCA. As such, school districts should not be required to provide catheterization as one of their legal obligations. This is not to say that a child will be excluded from the educational program, but only that other arrangements should be made so that the student can receive appropriate educational services from the public school while continuing to receive medical services under existing arrangements.

II. Clean intermittent catheterization (CIC) is not a related service necessary to enable the Respondent to benefit educationally from special instruction.

The EAHCA requires that a student's individual education plan (IEP) include provisions for related services to the extent a student needs them to benefit from special education.

The standard for interpreting when a related service becomes necessary has caused the proliferation of litigation in this area. Among the most important and far-reaching interpretations of the role of related services were those made by the Fifth Circuit, which concluded in this case that clean intermittent catheterization (CIC) is a related service. Tatro I. These interpretations not only portend financially onerous consequences for taxpayers and increased confusion on how to treat medical and health services in

deciding on student placements, but they also far exceed the guidelines subsequently later established by this Court in Rowley.

In its second consideration of Tatro, which occurred after the Rowley opinion was issued, the Fifth Circuit held that it must follow its previous interpretations of the EAHCA under "law of the case" principles "unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice," Tatro v. Texas, 703 F.2d 823, 826 (5th Cir. 1983)(hereinafter cited as Tatro II (citing White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967)(footnote omitted; enumeration added). The Tatro II panel concluded that none of these considerations

applied.

But this Court had indeed "made a contrary decision of the law applicable to such issues." Id. This Court examined whether the related service was necessary "to permit the child to benefit educationally from the [personalized] instruction." 102 S.Ct. at 3042. It did not base this standard on attendance, at any cost, in regular classes. By contrast, the Tatro I panel went beyond this standard in determining whether the related service was necessary not only for the student to benefit from special education, but also to be able to attend regular classes.

In the first district court opinion, Judge Higgenbotham had correctly recognized that CIC should be required under the statute only if necessary for the student to fully benefit from special education. 481 F.Supp. 1224, 1227 (N.D.Tex. 1979). This ruling, very

similar to the one in Rowley, was reversed by the Tatro I Fifth Circuit court. The Tatro I panel found, at variance with the Rowley standard, that since CIC was necessary for the student to attend regular classes, it must be provided regardless of whether or not a free appropriate education could be otherwise provided. In this case, the life support service had to be provided during school hours if the child was to attend regular classes. This expanded interpretation by the Tatro I panel is crucial since, logically extended, it could require some classrooms to be equipped with hospital beds and medical monitoring devices at public expense in order to provide similar life support services during school hours for children attending regular classes. See 625 F.2d at 563.

The EHA guarantees that students be educated in the least restrictive

environment appropriate. 20 U.S.C. §1412(5)(B). The test, as pointed out in Rowley, is not what could be offered or what would be the most ideal placement but whether the placement is appropriate. Thus, for a child needing life support services, an environment that is more restrictive than a regular classroom may be the least restrictive environment appropriate for that student. A comparison would be that of an unfortunate child confined to an iron lung for his daily survival. The least restrictive environment would be in a regular classroom structure. However, the least restrictive environment appropriate may be a homebound placement. The same rule should apply in this case. For this Court to decide otherwise will require the extensive expansion into the medical services field by school districts across the nation.

III. This case should be remanded for reconsideration of the individual education plan in light of the standards set by this Court in Rowley.

The individual education plan (IEP) under review here was drawn up five years ago. Even Respondent admits that this case may well be moot by the time this Court reaches a decision. Respondent's Brief in Opposition to Petition for Certiorari, at 9. Several cases have already been remanded for reconsideration in light of the standards established by this Court in Rowley. See Springdale School District No. 50 of Washington County v. Grace, 693 F.2d 41 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 2086 (1982); Grkman v. Scanlon, 563 F.Supp. 793 (W.D.Pa. 1983).

Since Rowley was decided after both Tatro I and the second district court ruling, Tatro v. Texas, 516 F.Supp. 968

(N.D.Tex. 1981), the petitioners argued to the Tatro II court that if the student could benefit from special education at home or in another institution providing CIC, their obligation to provide a free, appropriate education under EAHCA would be met. 703 F.2d at 829. The Tatro II panel erred in holding that the petitioners were estopped from such a claim, since it was raised for the first time after the Rowley ruling and no attempt had been made to modify the IEP accordingly. That panel should have followed the lead of this Court and the Third Circuit and remanded the case to federal district court for its first review using the new Rowley standard.

The original 1979 IEP for the student in this case apparently had not anticipated the Rowley interpretation of "related services," and had not considered alternative placement options

other than home placement that could have provided Respondent with needed special education services without the provision of CIC. For the most part, the many stipulations of fact that have been made during the course of this litigation were made in determining issues not relevant to the application of the Rowley standard. The Tatro II court, as an appellate court, is not in the position to receive the additional evidence from both parties that may be necessary to determine an appropriate placement if it is determined that the 1979 IEP is inappropriate. The mere addition of CIC services will not necessarily cure defects in that plan, and all of the placement considerations should be reexamined in the wake of Rowley.

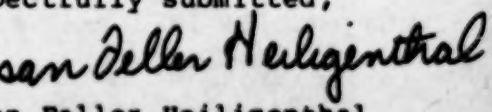
The decision of the court below, constrained by the Tatro I interpretations of the EAHCA issued

prior to and in conflict with this Court's interpretation of the law in Rowley, creates an untenuous situation where the definition of related services has been greatly expanded. Rather than prescribe a double standard in defining "related services," this Court's interpretations in Rowley should be applied and the Court should remand the case to federal district court for proper application of that standard. If this Court's interpretation is not adopted by the Fifth Circuit, existing case law absolving schools of financial responsibility for custodial and medical services will no longer be followed. See McKenzie v. Jefferson, 565 F.Supp. 404 (D.D.C. 1983). The financial implications of leavng the Fifth Circuit's ruling undisturbed are enormous.

CONCLUSION

For the foregoing reasons, the school districts of Texas, through the Texas Association of School Boards' Legal Assistance Fund, respectfully request a reversal of the ruling that clean intermittent catheterization (CIC) constitutes a related service for the purposes of the Education for All Handicapped Children Act (EAHCA). In addition, they request that this Court remand the case to federal district court for reconsideration of the appropriateness of Respondent's individual education plan (IEP) in light of the standards set in Rowley.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae in support of Petitioner have been served this day upon all parties by placing same in the United States Mail addressed to:

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